

Office of Chief Counsel
Internal Revenue Service

memorandum

CC:LM: [REDACTED]
[REDACTED]

date: 5/23/01

to: Team Coordinator - [REDACTED]
Attn: Jim Raiman

from: Area Counsel
[REDACTED]

subject: Restrictive Language for Consent, Form 872

We write in response to your most-recent draft of the restrictive language concerning the interest from the [REDACTED] bonds, and to memorialize the verbal advice concerning the recharacterization of that interest, each concerning the taxpayer, [REDACTED].

DISCLOSURE STATEMENT

This advice constitutes return information subject to I.R.C. § 6103. This advice contains confidential information subject to attorney-client and deliberative process privileges and if prepared in contemplation of litigation, subject to the attorney work product privilege. Accordingly, the I.R.S. recipient of this document may provide it only to those persons whose official tax administration duties with respect to this case require such disclosure. In no event may this document be provided to I.R.S. personnel or other persons beyond those specifically indicated in this statement. This advice may not be disclosed to taxpayers or their representatives.

This advice is not binding on the I.R.S. and is not a final case determination. Such advice is advisory and does not resolve Service position on an issue or provide the basis for closing a case. The determination of the Service in the case is to be made through the exercise of the independent judgment of the office with jurisdiction over the case.

Issues

1. You proposed to modify the language of paragraph (3)b. of Form 872 to identify this issue as follows:

The amount of notional principal contract income that [REDACTED] received from [REDACTED]; or, in the alternative, the amount of interest income reported by [REDACTED] from [REDACTED] bonds.

We conclude that this language includes the adjustments identified in the Form 886-A concerning "interest income - [REDACTED] bonds" in the consent to extend the statute of limitations, preserving the Service's right to make adjustments with respect to that issue.

2. Paragraph (3)c. of Form 872 adequately preserves the foreign tax credit issue. The recharacterization of the income as notional principal contract income, as the adjustment concerning the interest income side of the [REDACTED] bond transaction proposes, such income will be treated as U.S.-sourced income under Treas. Reg. § 1.863-7, since under that regulation, notional principal contract income is generally sourced by reference to the residence of the taxpayer. If the income is U.S.-sourced, it will not be eligible to be sheltered by any unrelated foreign tax credits that the taxpayer may have.

Please feel free to contact [REDACTED] at ([REDACTED]) [REDACTED] ext. [REDACTED], if you have any questions concerning this or the previous memorandum.

[REDACTED]
Area Counsel
[REDACTED]

By: [REDACTED]
[REDACTED]
Acting Associate Area Counsel
[REDACTED]

Office of Chief Counsel
Internal Revenue Service
memorandum

CC:LM: [REDACTED]
WRDavis

date: 2/16/01

to: Team Coordinator - [REDACTED]
Attn: Jim Raiman

from: Area Counsel
[REDACTED]

subject: Restrictive Language for Consent, Form 872

We respond to your request for assistance by reviewing the proposed language restricting the issues for which the taxpayer, [REDACTED] will consent to extend the statute of limitations.

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Issue

Does the restrictive language in the proposed consent to extend the statute of limitations preserve the Service's right to make adjustments with respect to the issues identified in the pertinent sections of the Revenue Agent's Report?

Facts, Analysis, and Recommendations

The taxpayer, [REDACTED], is currently under audit for the taxable years [REDACTED], and [REDACTED], inclusive. Your memorandum indicates that separate consents will be prepared for each of the three tax years, inasmuch as the issues are not common in each year.

We also note the absence of the taxpayer's identity on the proposed consent that you forwarded for review. We thus limit our review to the portion of the proposed consent setting forth the various issues to which the consent is restricted. If you wish advice on the taxpayer identity, feel free to contact the undersigned by telephone, and we will expedite that request.

It is well established that a Form 872 consent to extend the statute of limitations is essentially a unilateral waiver of a defense by the taxpayer, and not a contract in the true sense. Stange v. United States, 282 U.S. 270 (1931); United States v. Gayne, 137 F.2d 522 (2d Cir. 1943); Tallal v. Commissioner, 77 T.C. 1291 (1981). Since section 6501(c)(4) requires that the parties reach a written agreement, the courts have applied contract principles to determine the existence of and scope of that agreement. Kronish v. Commissioner, 90 T.C. 684, 693 (1988); Southern v. Commissioner, 87 T.C. 49 (1986); Piarulle v. Commissioner, 80 T.C. 1035, 1042 (1983). It is with this in mind that we provide our analysis and recommendations.

A. Paragraph (3) - introduction.

In this introductory paragraph, the manual suggests the use of alternate language to the clause, "including consequential changes to other items based on such adjustment(s)." I.R.M. § 8.2.1.3.3.12 suggests the use of the clause, "and includes any amount resulting from statutory computations or recomputations based on such adjustment."

Additionally, the consent should add, as a footnote to this provision, the statement, "The provisions of section 6511(c) of the Internal Revenue Code are limited to any refund or credit resulting from adjustment for which the period for assessment is extended under this agreement." Id.

B. Paragraph a. - [REDACTED] deduction.

The description of this item seems to identify the deduction that is in dispute. Without having the return, we cannot know the line item on which the disputed deduction is claimed. We assume that it is in a line item under "Other Deductions"

identified as "Bureau and Association Dues." If so, we agree with the proposed wording of the restriction. The only other suggestion concerns the exclusive use of the word, "payment." As a precaution, we offer as a suggestion the use of the term, "payment/accrual" to include that adjustment as an item covered by the consent in the event that facts later disclose that the [REDACTED], donation actually occurred in [REDACTED], and that it was merely accrued in [REDACTED].

C. Paragraph b. - [REDACTED] bond interest income.

This item concerns the Service's recharacterization of the income reported by [REDACTED] the taxpayer as interest income from its interest in [REDACTED] bonds that remained in possession of [REDACTED]. The adjustment, which arises from your determination that the taxpayer actually received notional principal contract income in a significantly smaller amount from [REDACTED], not high withholding tax interest income from the [REDACTED], does not result in any type of deficiency. Thus, we suggest that you identify "the amount of notional principal contract income that [REDACTED] received in [REDACTED] and [REDACTED] from [REDACTED]" as the adjustment to which the restriction applies.

D. Paragraph c. -

[REDACTED]

[REDACTED]

E. Paragraph d. - Foreign tax credit attributable to
 [REDACTED] bond interest income

We believe that, as worded, this restriction permits adjustments to any aspect involved in the determination of the

portion of the high withholding tax interest income foreign tax credit that involved any aspect - income, expenses, or foreign taxes - of the [REDACTED] bonds. The suggested language for paragraph b. changes the issue preserved from the reduction in the taxpayer's interest income from these bonds to a characterization of that income as notional principal contract income. To the extent that the Service prevails in its recharacterization of the nature of the taxpayer's "investment" in the [REDACTED] bonds, the taxpayer may wish to file a protective claim with respect to this income.

Alternately, you may wish to make clear that this restriction includes this income by appending to the wording of this restriction, "including, inter alia, the amount, if any, of foreign interest income earned by, and foreign taxes paid by [REDACTED] in connection with [REDACTED] bonds." This additional language may provide the taxpayer with the comfort to obviate the need for a protective claim.

F. Paragraph e. - Credit for increasing research activities

We believe that this clearly identifies the section 41 credit as an issue for which the consent extends the assessment statute.

Please feel free to contact [REDACTED] at ([REDACTED] [REDACTED]) ext. [REDACTED], if you have any questions concerning this memorandum.

[REDACTED]
Area Counsel
[REDACTED]

By: /s/

[REDACTED]
Acting Associate Area Counsel
[REDACTED]